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IN THE

Supreme Court of the United States

October Term, 1974
No. .....

In re the Marriage of
HARRY LLOYD MILHAN,
Petitioner,
and
MARY LEE MILHAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the Superior Court of the State of California for the County of Santa Barbara entered on January 16, 1975, pursuant to a decision and order of the Supreme Court of the State of California.

Opinion Below.

The opinion of the Supreme Court, State of California is reported at 13 Cal.3d 129 (1974); it is printed in Appendix A at page 1a, *infra*. The opinion was delivered and filed December 12, 1974.

Jurisdiction.

The opinion of the California Supreme Court was given and filed on December 12, 1974 and judgment

was thereafter entered thereon on January 16, 1975. This petition was filed within the time specified in 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Has not California applied its system of community property so as to frustrate the Congressional plan embodied in the National Servicemen's Life Insurance program by permitting a trial court to evaluate petitioner's NSLI policy and award the respondent an "equivalent amount" to a community property interest therein?

2. Was it the intent of Congress in enacting the federal military retirement system that retirement benefits be the sole, separate and personal entitlement of the serviceman not subject to division under the community property laws of the State of California or any other State?

a. Has the United States preempted the field and characterized federal military retirement benefits by virtue of its exclusive legislative jurisdiction, thus precluding the State of California from divesting petitioner of his retirement benefits?

b. Since federal courts have distinguished between federal pensions and military retirement and have characterized military retirement pay as present compensation for a continuation of active duty on a reduced basis, does not this characterization preclude the California courts from applying its system of community property to divest the petitioner of a portion of those retirement benefits?

Constitutional and Statutory Provisions Involved.

Appellant was retired pursuant to 10 U.S.C. §6323, the pertinent parts thereof are set out in Appendix B.

Five Congressional acts have formed the basis of 10 U.S.C. §6323:

1. The Act of February 21, 1946, 60 Stat. 27 is the predecessor of Title 10 U.S.C. §6323.

2. Act of April 14, 1949, Ch. 52, 63 Stat. 47, amends Title 34 U.S.C. §855(h), Pub. L. 81-91.

3. Act of August 10, 1956, Ch. 1041, 70A Stat. 399, Pub. L. 84-1028, Repealed 34 U.S.C. §§410(b) and 410(b)(1), and codified them as Title 10 U.S.C. §6323(a)-(c). Computation of retirement pay for retired members of the Navy or Marine Corps was codified in 10 U.S.C. §6325.

4. Act of September 2, 1958, §1, Ch. 142, 72 Stat. 1509, Pub. L. 85-861. This Act took the language of 10 U.S.C. §6325(a)(2) and without change, enacted §6323(e).

5. Act of October 2, 1963, §5(h)(4), 72 Stat. 214, Pub. L. 88-132.

Title 10 U.S.C. §§1447-1455 and §2771 are set out in Appendix B. Title 38 U.S.C. §3105 is set out in Appendix B.

These are four Acts of Congress that consider the relationship of federal military retirement pay to the morale of the men in the armed services:

1. Officer Personnel Act of 1947, 61 Stat. 795, Pub. L. 80-381.

2. Career Compensation Act of 1949, 63 Stat. 802, Pub. L. 81-351.

3. Career Incentive Act of 1955, 69 Stat. 19, Pub. L. 84-20.

4. Pay Readjustment Act of 1958, 72 Stat. 122, Pub. L. 85-422.

Pertinent comments from the Congressional Record are included in the Reasons for Granting the Writ.

United States Constitution, Article VI, Ch. 2 is included in Appendix B.

State Statutes.

California Probate Code §201, in Appendix B.

California Civil Code §§4800 and 5119 in Appendix B.

Statement of the Case.

The facts relevant to the questions presented by this petition may be introduced to the Court, as follows:

Husband and Wife were married on June 8, 1944, immediately following Husband's graduation from the United States Naval Academy. In choosing to pursue a career in the United States Navy, Husband was influenced by the substantial retirement benefits accorded retired personnel.

At the time of marriage, and throughout his naval career, Husband was a permanent resident and domiciliary of the State of Colorado, although the parties temporarily resided in several other states during this time. Not until Husband retired more than twenty-one years later, on November 1, 1964, did the parties assume permanent residence and domicile in the State of California. Soon thereafter the parties were separated and dissolution of the marriage eventually ensued.

Husband's retired pay is non-transferable, terminates upon his death and, as a condition thereof, Husband is

subject to recall to active duty at any time. The National Service Life Insurance policy is administered by the Veterans' Administration, and the Navy Mutual Aid life insurance policy by an elected board of Navy officers.

Wife testified at the trial that she is employed as an account executive with a national stock brokerage firm.

The Superior Court entered judgment on May 2, 1972 and decreed that the petitioner's NSLI policy and his Navy retirement pay was his separate property.

Thereafter, the Court of Appeal, Second Appellate District, State of California, reversed the judgment in an opinion filed February 28, 1974.

The California Supreme Court upheld the Court of Appeal and reversed the judgment of the trial court in an opinion reported at 13 Cal.3d 129 (1974) and filed on December 12, 1974, a copy of which is reproduced in Appendix A.

I.

The Judgment of the State Court Below Conflicts With a Decision of This Court and Frustrates the Implementation of Federal Law.

A. In the Leading Case of Wissner v. Wissner, 338 U.S. 655 (1950), This Court Held That the States Must Administer Their Systems of Community Property Law so as to Avoid Frustrating the Congressional Plan Which Established National Serviceman's Life Insurance (39 U.S.C. §801 et seq.).

In *Wissner*, a California trial court ordered the beneficiary of life insurance proceeds under the National Life Insurance Act (39 U.S.C. §701, *et seq.*) to pay one-half of the proceeds, as community property, to the deceased serviceman's widow. The trial court had found

that the serviceman's army pay, which was held to be community property, was the source of the premiums paid on the policy and, therefore, the insurance proceeds were determined to be community property as well.

This Court held that order invalid under the supremacy clause of the United States Constitution on the ground that the specific language of the Act,[1] construed in the light of Congressional intent, gave the serviceman the absolute right to choose the beneficiary of the policy and, hence, was not subject to the application of state community property law. As Justice Clark, for the majority, wrote:

> "It is plain to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money. We do not share appellee's discovery of congressional purpose that widows in community property states participate in the payments under the policy, contrary to the express direction of the insured. Whether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purposes of Congress. It cannot stand."
>
> *Wissner v. Wissner*, 338 U.S. 655, 658-59 (1950).

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[1]Title 38, United States Code, section 717(a), provides:

"The insured shall have the right to designate the beneficiary or beneficiaries of insurance maturing on or after August 1, 1946, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries."

As shall be explained, the decision of the California Supreme Court countenances the same interference with the serviceman's choice of beneficiary as struck down by this Court in *Wissner*.

B. The Decision Below Represents a Conflict Between the Administration of a State's Community Property System and the Congressional Plan Establishing National Service Life Insurance.

In 1949, the California courts attempted, without success, to reconcile that state's body of community property law with the Congressional policy and plan which was the genesis of the governmentally sponsored, low-cost servicemen's life insurance program. Once again in the matter here under consideration, the California Supreme Court has attempted to rationalize these two systems; however, it has failed to reconcile the areas of conflict.

In the decision below, the California court correctly summarizes this Court's foundational statement of the applicable law. Specifically, the court wrote:

> "*Wissner* does not forbid the states from applying their community property laws to achieve an equitable division of marital property, so long as the operation of those laws does not frustrate congressional intent."
>
> *In re Marriage of Milhan*, 13 Cal.3d 129, 132 (1974).

Moreover, the court below clearly understood the *Wissner* teaching that, in the context of the NSLI policy, a beneficiary could not be deprived of one-half of the insurance proceeds by requiring the repayment of either "the very money received from the Government

or an equivalent amount. . . ." (338 U.S. 655, 659) As the California court explained:

> "Obviously, to require the beneficiary to turn over an equivalent amount to the wife would directly frustrate congressional intent to permit the husband's beneficiary to retain *all* of the proceeds from the NSLI policy."
>
> *In re Marriage of Milhan,* 13 Cal.3d 129, 133 n.2 (1974).

Despite these clear indications that the California court was aware of this Court's expressed policy, it nonetheless held that the trial court could evaluate the community interest in the military life policy and award the spouse "an equivalent amount in *other* [community] property available for disposition."

> *In re Marriage of Milhan,* 13 Cal.3d 129, 132 (1974). (See text accompanying footnote 2.)

The practical effect of this proposed procedure is precisely the type of interference with the Congressional plan forbidden by this Court in *Wissner*: the petitioner must, in fact, now surrender his NSLI policy for its cash value in order to have sufficient funds on which to live, since other assets which would have been available for this purpose had the community property been equally divided, will go to his ex-spouse when the California court "evaluates" the NSLI policy and awards the ex-spouse a share therein from "*other* [community] property available for disposition."

The factual milieu of the present case makes it a particularly compelling one for action by this Court. The petitioner, a career military officer who never resided in a community property state until after his re-

tirement, exists solely on his modest service pension and current employment. The respondent, on the other hand, is remarried, has a husband who is employed and providing her with support, and is herself engaged in lucrative employment. Under the ruling of the California court, the petitioner's one-half of the community property—which he could normally expect as a fund from which to augment his modest income—will be decreased to reflect the court's evaluation of his ex-spouse's purported interest in the NSLI policy. Inasmuch as such an evaluation and award will leave him with less funds, he may ultimately be forced to surrender his policy for cash to obtain funds for his support. Clearly, such a result would frustrate the Congressional plan in establishing NSLI insurance and would constitute an interference therewith forbidden by this Court in *Wissner*.

II.

The Judgment of the State Court Below Conflicts With a Decision of This Court in That It Held That U.S. Military Retirement Pay Was Community Property.

A. In Wissner v. Wissner, 338 U.S. 655 (1950), This Court Established the Test to Ascertain Congressional Intent With Respect to the Character of Funds Paid Pursuant to a Congressional Act.

Wissner held that the proceeds of a National Servicemen's Life Insurance Policy were the separate property of the insured serviceman rather than the community property of the serviceman and his spouse. There, the Court reversed a California appellate court and held that the benefits payable under the policy were the separate property of the insured, despite the fact that the payments of premiums on the policy came from

the earnings of the serviceman during marriage. In its analysis, this Court discussed the conflict between the clear intent of Congress and the California decision under review which had frustrated that intent:

> "We do not share Appellee's discovery of Congressional purpose that widows in community property states participate in the payments under the policy, contrary to the express directions of the insured. Whether directed at the very money received from the government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It can not stand." (338 U.S. at 659, 70 S.Ct. at 400. Emphasis added.)

The *Wissner* test provides that if Congress intended federal benefits to achieve certain goals and ends, then those benefits would be considered the separate property of the recipient. In the specific context of military retirement pay, these legislative ends are: Military retirement pay must have been intended to directly enhance the morale of the serviceman (338 U.S. at 660, 70 S.Ct. at 401); the benefits must have been intended to be paid from Congressional appropriations (338 U.S. at 658, 70 S.Ct. at 399); the cost of administering the retirement pay system must have been intended to be borne by the United States (338 U.S. at 658, 70 S.Ct. at 399); the premiums paid into the retirement pay system must have been intended to be as low as possible (338 U.S. at 658, 70 S.Ct. at 399); and, the retirement pay system must have been intended to afford as much protection as possible to the serviceman (338 U.S. at 660, 70 S.Ct. at 401).

To determine whether the retirement pay here under consideration satisfies the *Wissner* criteria, the legisla-

tive history of the act providing for the pay must be analyzed. The legislative history of a statute, of course, is the proper source to ascertain the intent of Congress as to its ultimate purpose. *United States v. Wise,* 370 U.S. 405, 414 (1962); see also *United States v. Zacks,* 375 U.S. 59 (1963).

The petitioner was retired pursuant to the authority of 10 U.S.C. §6323 and an analysis of the five Congressional Acts forming the basis thereof and the four Acts of Congress bearing on the morale of servicemen, reveals that military retirement pay satisfies the *Wissner* criteria.[2] Each will be examined in turn.

Congress must have been concerned about raising the morale of the men in the armed services in enacting the system of military retirement pay. That the Act of February 21, 1946[3] was enacted for the purpose of inducing young men to make a career of the armed services is clear because Congress provided the servicemen with incentives to remain in the services for at least twenty years. For example, statutory provisions with respect to retirement included: the age of retirement was lowered; an improved system to compute retirement pay was established; a serviceman was allowed to retire after only twenty years of service; and, the serviceman was not required to make any contributions to his retirement fund.

Congress intended military retirement pay to be paid from Congressional appropriations. A review of the Con-

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[2]Officer Personnel Act of 1947; 61 Stat. 795, P.L. 80-381; Career Compensation Act of 1949; 63 Stat. 802, P.L. 81-351; Career Incentive Act of 1955; 69 Stat. 19, P.L. 84-20; Pay Readjustment Act of 1958; 72 Stat. 122, P.L. 85-422.

[3]An act to provide additional inducement to citizens of the United States to make a career of the United States Military or Naval Service, and for other purposes. Ch. 4 Sec. 6, 60 Stat. 27, P.L. 79-305.

gressional Record, for example, reveals that the legislators well understood that the servicemen would, "never contribute one nickel toward any retirement fund." 91 Cong. Rec. 12465. Thus, Congress must also have intended the cost of administering the retirement pay system to be borne by the United States.

Congress clearly intended that premium or contributions to the military retirement system be low. Moreover, since there are *no* premiums or contributions required to be paid by the serviceman, all costs must be satisfied from governmental appropriations and the expenses of administering the system must be borne by the United States. These aspects of the system are revealed in Congressional comments made during debate over a subsequent act, which also became part of 10 U.S.C. §6323.[4] For example:

> "Fortunately, we have for our military personnel the most liberal retirement provisions our subcommittee was able to learn about anywhere in the world. The retirement compensation is paid by the Federal government . . . as yet it has not been necessary to care for any contributions by the personnel involved. The retirement is paid for by direct appropriation, with no contribution." (104 Cong. Rec. 7613).

Congress intended the retirement pay to afford as much protection as possible to the serviceman. Indeed, this particular goal is inherent in the military retirement system itself and in all five acts forming 10 U.S.C. §6323.[5] Throughout the development of military re-

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[4]Act of June 1, 1958; 72 Stat. 122, Pub. L. 85-422. Pay Readjustment Act of 1958.

[5]*See, e.g.*, Act of October 2, 1963, Sec. 5(h)(4), 77 Stat. 214, Pub. L. 88-132.

tirement legislation the Congressional purpose has been to insure that the retired serviceman is able to maintain the same living standard post-retirement as he did while on active duty. *See* 109 Cong. Rec. 14202.

In the foregoing application of the tests established in *Wissner, supra,* the petitioner has demonstrated that Congress specifically intended for military retirement pay to be the separate property of the recipient. Notwithstanding this intention, however, a California decision has held that federal military retirement pay is community property.

When such a conflict occurs, there can be only one outcome. The California decision must yield to the clear and specific intent of Congress. (Article VI, Clause 2 of the United States Constitution; *Free v. Bland,* 269 U.S. 663 (1962); *Wissner v. Wissner,* 338 U.S. 655 (1950).)

B. Should This Court Decide That the Wissner Test Is Not Dispositive, Then the California Court Decided a Substantial Federal Question Not Heretofore Determined.

Even assuming, for the sake of argument, that *Wissner* left open the character of federal military retirement benefits, it must be federal law that will govern the interpretation of a federal right. *Free v. Bland, supra.*

The United States has exclusive jurisdiction to characterize a federally created right and the states cannot operate in the area until or unless the state law has been absorbed as the federal rule.[6]

Federal law is silent with respect to the character of military retirement pay and there is absolutely no indi-

[6]Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 488, 534 (1954).

cation in the legislative history or elsewhere that the Congress has ever considered retirement pay to be a partnership asset divisible at divorce or dissolution of marriage. Moreover, the statutes do not even refer to, much less provide for, the spouse of the retired serviceman. On the other hand there is every indication that Congress intended the retirement pay to be the separate property of the recipient and a "personal entitlement" of the retiree which ceases upon his death. *See, e.g., U.S. Code Congressional and Administrative News,* 70th Congress, 2nd Sess. (1968) Vol. 3, at 3300; Navy Guide for Retired Personnel and their Families, *NAVPERS* 15891, at 89 (1970).

The federal military retirement scheme is wholly inconsistent with the California community property system. For example, Congress enacted in 1953 the "Contingency Option Plan," which permitted a retired serviceman to provide an annuity for his widow and children after he died. This scheme was subsequently renamed the Retired Serviceman's Family Protection Plan and was funded with deductions from the retiree's payments. (*U.S. Code Congressional and Administrative News,* 90th Cong., 2nd Sess. (1968) Vol. 3, 3307.) Although the plan originally continued even if there were no longer an eligible beneficiary, Congress rectified the oversight by providing for an automatic termination of the deduction when that occurred. (*Id.* at 3301-3306.) Significantly, the legislative history reveals the reason for the change: "To safeguard the participant's future retired pay when the spouse predeceases the member, *or* a *divorce* occurs . . ." (*Id.* at 3307. Emphasis added.)

Congress clearly intended that military retirement pay was to be the separate property of the retiree;

however, if the states are permitted to deal with these benefits as community property, then that which Congress had sought to prevent may occur: the states may compel the retiree to share retirement pay with a spouse whom Congress explicitly found ineligible for *voluntary* coverage.

A further indication that military retirement pay was intended to be the separate property of the serviceman is that Congress specifically provided that unpaid pay and allowances would be disbursed upon the death of the retiree to those beneficiaries whom the *retiree* designated. (*See* Navy Guide for Retired Personnel and their Families, NAVPERS 15891C Para. 46, at 23 (1970); 10 U.S.C. §2771.) However, if federal military retirement pay is a community property asset as the California court suggests, then the retiree could not effectively designate the recipient of the unpaid monies that are due when he dies. This Congressionally prescribed power of testamentary disposition is on its face repugnant to application of the California community property system, which provides that one-half of the community property passes to the surviving spouse. *California Probate Code* §201.

That further inconsistencies and conflicts exist is evident by the fact that under 38 U.S.C. §3105 (1970) a disabled serviceman is given the option to waive all or part of his retired pay to receive a Veteran's Administration pension and thereby convert part of his pay to a gratuity. *Lynch v. United States,* 292 U.S. 571, 577 (1934); *Berkey v. United States,* 361 F.2d 983, 987, 988 (Ct.Cl. 1966). Such a gratuity would be his separate property. *California Civil Code* §4800.

A final contrast which reveals the irreconcilable conflict between the Congressional scheme and the com-

munity property system is that which exists between the benefits available to a *former spouse*, whom Congress intentionally neglected, and those available to the widow, whom Congress provided for. If military retirement pay is community property, then after a dissolution the widow's share would become her separate property. *Phillipson v. Board of Administration*, 3 Cal.3d 32, 42 n.9 (1970). If she then remarried, the retired serviceman would be obligated to contribute to the support of the second husband and the children of the second marriage. In contrast, under the Survivor Benefit Plan (10 U.S.C. §§1447-1455) the annuity of a widow *terminates* upon her remarriage. 10 U.S.C. §1450(b). The only possible conclusions to be reached are either that the widow, whom Congress preferred, is to be treated less favorably than the ex-wife, whom Congress completely neglected, "or perhaps more logically that *those it neglected have no community property right.*" (Is Armed Services Retired Pay Really Community Property? Judge B. Abbot Goldberg, Cal. State Bar Journal, Vol. 48, No. 1 at 89. Emphasis added.)

Since Congress so forcefully and clearly intended that military retirement be the "personal entitlement" of the serviceman[7] and because the entire scheme of the military retirement system reflects a Congressional disregard of the state community property system, the supremacy clause of the Constitution (Art. VI, Cl. 2) requires that the State court decision and statutory law must give way to the *express will of Congress.*

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[7]U.S. Code Congressional and Administrative News, 90th Congress, 2nd Session (1968) Vol. 3 at 3300.

C. By Characterizing Military Pay as Compensation for Past Services, the California Supreme Court Has Decided a Substantial Federal Question Inconsistently With Decisions of the Federal Courts.

While federal courts draw a distinction between military retirement pay and pensions, California decisions reveal that California refuses to recognize a pension as a gratuity under California law. Federal courts, on the other hand, treat retirement pay quite differently than a pension. For example, in *Lemly v. United States,* 75 F.Supp. 248 (Ct.Cl. 1948), the court stated:

> "An examination of the Acts of Congress through the years reveals that when the word 'pension' was used, it meant 'pension' (Federal definition) and when 'retirement pay' was used it meant 'retirement pay' (Federal definition). It is evident that Congress recognizes that each word has its own individual meaning and by such usage distinguishes between 'pensions', 'retirement pay', 'compensation', 'hospital benefits,' etc."
>
> *Lemly, supra* at 249.

The Court in *Lemly, supra,* then continued with the following significant language:

> "In other words, when a *pension* is paid someone, he is considered all through, his services are over, and he is pensioned 'off'. Furthermore, a pension is paid after the service has been performed without any regard to the actual performance of service as a gratuitous recognition of a moral or honorary obligation of the government. When a person is 'pensioned off' by the government, that government no longer has any control over his services. He is actually all through serving the government and yet he receives his pension as long as he lives." (*Id.*)

Thus, a federal "pension" is recognized as pay for services *that have already been rendered.*

On the other hand, federal military *retirement pay* is treated entirely different by the courts:

> *"Retirement pay . . . is a continuation of active duty pay on a reduced basis. Even though an officer is retired from active duty and is receiving retirement pay, he is still subject to call on active duty as long as his physical condition will permit. He is still an officer in the service of his country even though on the retired list." Lemly, supra* at 249. (Emphasis added.)

Furthermore, this distinction has been consistently followed. For example, in *Hostinsky v. United States,* 292 F.2d 508 (Ct.Cl. 1961), the court wrote:

> "Plaintiff says a retired officer does not hold an office. We think that an officer in the Navy, though retired, is still an officer. He continues to draw pay as a retired officer. Being an officer, he is subject to recall whether he wishes to serve or not. He is still subject to naval discipline." *Hostinsky, supra* at 510.

Here, petitioner has not ended his obligations to the United States. He is subject to recall, as long as his physical condition permits. Furthermore, he is subject to discipline of his supervisors and he must inform them of his place of residence. The petitioner's retired pay may be forfeited if he loses his citizenship or acquires foreign citizenship by an action inconsistent with his oath of allegiance to the United States. (See Marine Corps Retirement Guide (1972) NAVMC 2642 Ch. 46, p. 54.) The retiree is subject to the rules and provisions of the Uniform Code of Military Justice. In sum, as compensation and in return for fulfilling these obliga-

tions, petitioner receives pay, in the form of federal military retirement benefits. See *Lemly v. United States, supra* at 249.

In California, active duty pay, like any compensation received for employment, is not subject to distribution in a dissolution proceeding. California Civil Code §5119. Therefore, federal military retirement pay which is characterized as active duty pay—at a reduced rate—by the federal courts, is *not* within the jurisdiction of the California courts in a dissolution proceeding. This conclusion is supported by decisions in the military courts. For example, in *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958) the court ruled that retired servicemen are still members of the Armed Services. In fact, in *Hooper* the court expressly stated that retired pay is compensation for the serviceman's availability:

> "The salaries they receive are *not* solely recompenses for past services, but a means devised by Congress to assure their availability and preparedness in further contingencies." *Hooper, supra* at 645 (Emphasis added).

The foregoing discussion reveals that various federal courts have previously confronted the problems presented by military retirement pay and have consistently held that retirement beenfits are not compensation solely for past services but *present* compensation received for current employment in the form of continued availability for military service. And inasmuch as the federal courts have settled the nature of federal military retirement compensation, that pay is not subject to characterization by the California courts. (United States Constitution, Art. VI, Cl. 2).

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion and decision of the Supreme Court of California in this action.

Dated: March 17, 1975.

Respectfully submitted,

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APPENDIX A.

[L.A. No. 30298. In Bank Dec. 12, 1974.]

In re the Marriage of Mary Lee and Harry Lloyd Milhan.

Mary Lee Milhan, Appellant, v. Harry Lloyd Milhan, Respondent.

BURKE, J.*—In this case we determine the extent to which the trial court in a marriage dissolution proceeding may exercise jurisdiction over a National Service Life Insurance policy issued to one of the parties but paid for with community property funds. We conclude that, in view of federal law protecting an insured's interest in and control over such military policies, the trial court is without authority to divest the insured of such interest or control. Specifically, the court may not award the policy to the other spouse, may not deprive the insured of his right to change the beneficiary of the policy, and may not require the insured to surrender the policy in order to obtain, and thereupon divide and distribute, its cash value. We hold, however, that if sufficient community assets exist aside from the policy, the trial court may award the other spouse an amount therefrom equivalent to his or her community interest in the policy.

The parties ("Husband" and "Wife") were married in 1944, following Husband's graduation from the United States Naval Academy. Husband became an ensign in the United States Navy and, during the course of his career, he obtained the two policies at issue, a National Service Life Insurance Policy with a cash value, at time of trial, of $2,190, and a Navy Mutual

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Counsil.

Aid Association Policy, with a cash value of $2,293. It appears undisputed that Husband paid the premiums on these policies from community income. Husband retired in 1965 and began receiving military retirement pay in the approximate amount of $600 monthly. The parties separated in 1968.

On May 2, 1972, the trial court entered judgment in the dissolution proceedings, dividing the community property between the parties and finding that the subject life insurance policies and military retirement pay were Husband's separate property. Wife appeals, contending that she should have been awarded her community share of these assets.

Initially, it is now clear that military retirement pay attributable to employment during marriage may, if vested in interest, be treated as community property and subject to equal division between the spouses upon dissolution of their marriage. (*In re Marriage of Fithian*, 10 Cal.3d 592 [111 Cal.Rptr. 369, 517 P.2d 449].) Husband, now aware of our recent *Fithian* opinion, reluctantly agrees that the judgment below must be reversed and remanded on the issue of retirement pay. He continues to contend, however, that the two life policies were and are his separate property over which the trial court had no jurisdiction.

Husband relies upon the principles set forth by the United States Supreme Court in *Wissner v. Wissner*, 338 U.S. 655 [94 L.Ed. 424, 70 S.Ct. 398], also involving an asserted community interest in a National Service Life Insurance policy.[1] We discussed *Wissner*

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[1]We have assumed, in the absence of any contrary argument by Wife, that Husband's policies (and especially his Navy Mutual Aid Association policy) possesses characteristics substantially

in our *Fithian* opinion, as follows: "In *Wissner*, the trial court ordered the beneficiary of life insurance proceeds under the National Service Life Insurance Act (38 U.S.C. § 701 et seq.) to pay half the proceeds, as community property, to the deceased soldier's widow. The United States Supreme Court held the order invalid under the supremacy clause on the ground that the specific language of the act, [fn. omitted] construed in the light of congressional intent, gave the serviceman the absolute right to choose the beneficiary of the policy and hence was invulnerable to the application of state community property law.

"*Wissner* does not require community property states to classify the proceeds of National Service Life Insurance policies as separate property, but only to refrain from administering those incidents of community property law which would frustrate the congressional plan. In *Estate of Allie* (1958) 50 Cal.2d 794 [329 P.2d 903], we held that insurance proceeds payable to the serviceman's estate may be considered community property since such a classification does not hinder the insured's free choice of beneficiaries. It is clear, therefore, *Wissner* did not establish a general rule that federal employment benefits cannot be treated as community property, but merely construed a specific statute in view of the congressional intent it embodies. [Fn. omitted.] *Wissner* has no controlling impact on the case at bar except to mandate us to examine the legislative

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identical to the National Service Life Insurance policy involved in the *Wissner* case. It should be noted that some federal life insurance policies differ substantially from the NSLI policy, justifying differences in treatment upon the insured's death or the dissolution of his marriage. (See, e.g., *Carlson v. Carlson*, 11 Cal.3d 474 [113 Cal.Rptr. 722, 521 P.2d 1114], involving a policy issued under the Federal Employees' Group Life Insurance program.)

goals behind the federal military retirement pay system." (10 Cal.3d at pp. 597-598.)

We believe that the foregoing analysis of *Wissner* is equally pertinent to the case before us. *Wissner* does not forbid the states from applying their community property laws to achieve an equitable division of marital property, so long as the operation of those laws does not frustrate congressional intent. Clearly, given the express congressional intent to assure the serviceman the absolute right to select his beneficiaries, the state courts could not require him to name his former spouse as beneficiary. By a parity of reasoning, the courts could not require him to cancel or surrender the policy and to pay half its cash value to his spouse, for the forced surrender of a military policy obviously would defeat Congress' purpose to provide low-cost life insurance protection to servicemen and their beneficiaries. (See *Carlson v. Carlson, supra,* 11 Cal.3d 474, 477.)

On the other hand, *Wissner* seemingly would not prohibit the trial courts from evaluating the community interest in a military life policy and awarding the insured's spouse an equivalent amount in *other* property available for disposition.[2] Under such a procedure, Husband in

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[2]Life insurance policies purchased with community funds ordinarily are considered community assets in which each spouse owns a present, existing and equal interest. (See *Tyre v. Aetna Life Ins. Co.*, 54 Cal.2d 399, 402-403 [6 Cal.Rptr. 13, 353 P.2d 725]; *Grimm v. Grimm*, 26 Cal.2d 173, 175 [157 P.2d 841].) In analogous situations, it has been suggested that upon dissolution of the marriage the trial court may allow one of the spouses to retain such a community asset so long as commensurate provision is made for the other spouse. (See *Waite v. Waite*, 6 Cal.3d 461, 473-474 [99 Cal.Rptr. 325, 492 P.2d 13] [judge's retirement pension]; *Phillipson v. Board of Administration*, 3 Cal.3d 32, 46 [89 Cal.Rptr. 61, 473 P.2d 765] [state employee's retirement pension]; *Gelfand v. Gelfand*, 136 Cal. App. 448, 455-456 [29 P.2d 271] [insurance policy].)

(This footnote is continued on next page)

the instant case would retain both policies in force, along with the right to change the beneficiaries thereunder. Wife would be awarded one-half of the cash value of those policies, payable out of assets which otherwise would be awarded to Husband. Provision could be made for Husband to discharge this obligation over a period of time if insufficient property exists at the time of dissolution. In no event, however, should Husband be ordered to surrender, or otherwise impair, his policies in order to satisfy Wife's community claim, for such an order would violate the overriding federal law discussed above.

The judgment is reversed and the trial court directed to enter judgment in accordance with this opinion.

Wright, *C.J.*, McComb, *J.*, Tobriner, *J.*, Mosk, *J.*, Sullivan, *J.*, and Clark, *J.*, concurred.

Nothing in *Wissner* suggests that an equitable division of community property is precluded simply because an NSLI policy is involved. *Wissner* did state that the husband's *beneficiary* (his mother) could not be required to repay to the wife either "the very money received from the Government or an equivalent amount. . . ." (338 U.S. 655, 659 [94 L.Ed. 424, 429].) Obviously, to require the beneficiary to turn over an equivalent amount to the wife would directly frustrate congressional intent to permit the husband's beneficiary to retain *all* of the proceeds from the NSLI policy. In the instant case, both the beneficiary and the wife may be protected by making use of other property available for distribution, in the manner set forth above.

APPENDIX B.

Statutes.

10 U.S.C.A. § 1447 SURVIVOR BENEFIT PLAN Definitions

In this subchapter:

(1) "Plan" means the Survivor Benefit Plan established by this subchapter.

(2) "Base amount" means—

(A) the amount of monthly retired or retainer pay to which a person—

(i) was entitled when he became eligible for that pay; or

(ii) later became entitled by being advanced on the retired list, performing active duty, or being transferred from the temporary disability retired list to the permanent disability retired list; or

(B) any amount less than that described by clause (A) designated by that person on or before the first day for which he became eligible for retired or retainer pay, but not less than $300;

as increased from time to time under section 1401a of this title.

(3) "Widow" means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—

(A) was married to him for at least two years immediately before his death; or

(B) is the mother of issue by that marriage. . . .

§ 1448. *Application of plan*

(a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to

retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision. An election not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay. However, a person who is not married when he becomes entitled to retired or retainer pay but who later marries, or acquires a dependent child, may elect to participate in the Plan but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries, or acquires that dependent child. Such an election may not be revoked. His election is effective as of the first day of the month after his election is received by the Secretary concerned.

(b) A person who is not married and does not have a dependent child when he becomes entitled to retired or retainer pay may elect to provide an annuity to a natural person with an insurable interest in that person.

(c) The application of the Plan to a person whose name is on the temporary disability retired list terminates when his name is removed from that list and he is no longer entitled to retired pay.

(d) If a member of an armed force dies on active duty after he has become entitled to retired or retainer pay, or after he has qualified for that pay except that he has not applied for or been granted that pay, and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it

had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between that amount of compensation and 55 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450(a) (1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died.

Added Pub.L. 92-425, § 1(3), Sept. 21, 1972, 86 Stat. 707.

. . .

§ 1450. *Payment of annuity: beneficiaries*

(a) Effective as of the first day after the death of a person to whom section 1448 of this title applies, a monthly annuity under section 1451 of this title shall be paid to—

(1) the eligible widow or widower;

(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section; or

(3) the natural person designated under section 1448(b) of this title at the time the person to whom section 1448 applies became entitled to retired or retainer pay, if there is no eligible beneficiary under clause (1) or (2).

(b) An annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost. An annuity for a widow or widower shall be paid to the widow or widower while the widow or widower is living or, if the widow or widower remarries before reaching age 60, until the widow or widower

remarries. If the widow or widower remarries before reaching age 60 and that marriage is terminated by death, annulment, or divorce, payment of the annuity will be resumed effective as of the first day of the month in which the marriage is so terminated. However, if the widow or widower is also entitled to an annuity under this section based upon the marriage so terminated, the widow or widower may not receive both annuities but must elect which to receive.

(c) If, upon the death of a person to whom section 1448 of this title applies, the widow or widower of that person is also entitled to compensation under section 411(a) of title 38, the widow or widower may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.

(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(i) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title.

(e) If no annuity under this section is payable because of subsection (c), any amounts deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower. If, because of subsection (c), the annuity payable is less than the amount established under section 1451 of this title, the annuity payable shall be recalculated under that section. The amount of the

reduction in the retired or retainer pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted prior to the computation of that recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the widow or widower.

(f) An unmarried person who elects to provide an annuity to a person designated by him under subsection (a) (3), but who later marries or acquires a dependent child, may change that election and provide an annuity to his spouse or dependent child. A change of election under this subsection is subject to the rules with respect to execution, revocation, and effectiveness set forth in the last three sentences of section 1448(a) of this title.

(g) Except as provided in section 1449 of this title or in subsection (f) of this section, an election under this section may not be changed or revoked.

(h) Except as provided in section 1451 of this title, an annuity under this section is in addition to any other payment to which a person is entitled under any other provision of law. Such annuity shall be considered as income under laws administered by the Veterans' Administration.

(i) An annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process.

Added Pub.L. 92-425, § 1 (3), Sept. 21, 1972, 86 Stat. 708.

Legislative History. For legislative history and purpose of Pub. L. 92-425, see 1972 U.S. Code Cong. and Adm. News.

§ 1451. *Amount of annuity . . .*

§ 1452. *Reduction in retired or retainer pay*

(a) The retired or retainer pay of a person to whom section 1448 of this title applies who has a spouse, or who has a spouse and a dependent child, and who has not elected to provide an annuity to a person designated by him under section 1450(a) (3) of this title, or who had elected to provide such an annuity to such a person but has changed his election in favor of his spouse under section 1450(f) of this title, shall be reduced each month by an amount equal to 2½ percent of the first $300 of the base amount plus 10 percent of the remainder of the base amount. As long as there is an eligible spouse and a dependent child, that amount shall be increased by an amount prescribed under regulations of the Secretary of Defense.

(b) The retired or retainer pay of a person to whom section 1448 of this title applies who has a dependent child but does not have an eligible spouse, shall, as long as he has an eligible dependent child, be reduced by an amount prescribed under regulations of the Secretary of Defense.

(c) The retired or retainer pay of a person who has elected to provide an annuity to a person designated by him under section 1450(a) (3) of this title shall be reduced by 10 percent plus 5 percent for each full 5 years the individual designated is younger than that person. However, the total reduction may not exceed 40 percent.

(d) If a person who has elected to participate in the Plan has been awarded retired or retainer pay and is not entitled to that pay for any period, he must deposit in the Treasury the amount that would other-

wise have been deducted from his pay for that period, except when he is called or ordered to active duty for a period of more than 30 days.

(e) When a person who has elected to participate in the Plan waives his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect unless, in accordance with section 8339(i) of title 5, he has notified the Civil Service Commission that he does not desire any spouse surviving him to receive an annuity under section 8341(b) of title 5.

(f) Except as provided in section 1450(e) of this title, a person is not entitled to any refunds of amounts deducted from retired or retainer pay under this section unless the amounts were deducted through administrative error.

Added Pub.L. 92-425, § 1(3), Sept. 21, 1972, 86 Stat. 710.

Legislative History. For legislative history and purpose of Pub. L. 92-425, see 1972 U.S. Code Cong. and Adm. News.

§ 1453. *Recovery of annuity erroneously paid . . .*

§ 1454. *Correction of administration deficiencies . . .*

§ 1455. *Regulations*

The President shall prescribe regulations to carry out this subchapter. Those regulations shall, so far as practicable, be uniform for the armed forces, the National Oceanic and Atmospheric Administration, and the Public Health Service. Those regulations shall—

(1) provide that, when the notification referred to in section 1448(a) of this title is re-

quired, the member and his spouse shall, before the date the member becomes entitled to retired or retainer pay, be informed of the elections available and the effects of such elections; and

(2) establish procedures for depositing the amounts referred to in section 1452(d) of this title.

Added Pub.L. 92-425, § 1(3), Sept. 21, 1972, 86 Stat. 711.

Legislative History. For legislative history and purpose of Pub. L. 92-425, see 1972 U.S. Code Cong. and Adm. News.

10 U.S.C.A. § 2711. *Final settlement of accounts: deceased members*

(a) In the settlement of the accounts of a deceased member of the armed forces who dies after December 31, 1955, an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned.

(2) Surviving spouse.

(3) Children and their descendants, by representation.

(4) Father and mother in equal parts or, if either is dead, the survivor.

(5) Legal representative.

(6) Person entitled under the law of the domicile of the deceased member.

38 U.S.C.A. §3105. *Waiver of retired pay*

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmosphere Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if he were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of his retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.

As amended Pub.L. 91-621, § 6(a)(3), Dec. 31, 1970, 84 Stat. 1864.

1970 Amendment. Pub.L. 91-621 substituted "National Oceanic and Atmospheric Administration" for "Coast and Geodetic Survey".

Legislative History. For legislative history and purpose of Pub.L. 91-621, see 1970 U.S. Code Cong. and Adm. News, p. 5757.

10 U.S.C.A. § 6323

"(a) An officer of the Navy or Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

"(b) For the purposes of this section (1) and officer's years of active service are computed by adding all his active service in the armed forces; and (2) his years of service as a commissioned officer are computed by adding all his active service in the armed forces under permanent or temporary appointments in grades above warrant officer, W-1.

"(c) Unless otherwise entitled to a higher grade, each officer retired under this section shall be retired (1) in the highest grade, permanent or temporary, in which he served satisfactorily on active duty as determined by the Secretary of the Navy; or (2) if the Secretary determines that he did not serve satisfactorily in his highest temporary grade, in the next lower grade in which he has served, but not lower than his permanent grade. . . .

"(c) Unless otherwise entitled to a higher pay, an officer retired under this section is entitled to retired pay at the rate of 2½ percent of the basic pay to which he would be entitled if serving on active duty in the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based. . . ."

United States Constitution, Article VI, Clause 2.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, anything on the Constitution or the laws of any State to the contrary notwithstanding."

State Statutes.

California Probate Code, § 201

§ 201. *Title of surviving spouse; portion subject to testamentary disposition or succession*

Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code. (Stats. 1931, c. 281, p. 595, §201, as amended Stats. 1935, c. 831, p. 2249, § 2.)

California Civil Code § 4800

(a) Time of division; equality.

(a) Except upon the written agreement of the parties, or an oral stipulation of the parties in open court, the court shall in its interlocutory judgment of dissolution of marriage . . . divide the community property and the quasi community property of the parties . . . equally.

California Civil Code § 5119

After the rendition of a judgment decreeing legal separation of the parties, the earnings or accumulations of each party are the separate property of the party acquiring such earnings or accumulations.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1177

HARRY LLOYD MILHAN, *Petitioner*,

v.

MARY LEE MILHAN, *Respondent*.

On Petition for a Writ of Certiorari to The Supreme Court of California

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BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the California Supreme Court is now reported at 528 P.2d 1145.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

QUESTIONS PRESENTED

1. In a distribution of property following dissolution of a marriage, is the supremacy clause of the

United States Constitution contravened by a judgment of a state court awarding the wife of a retired serviceman an amount of money equivalent to the wife's community property interest in the husband's National Service Life Insurance policies, where the judgment expressly conditions the award upon existence of sufficient community assets aside from the policies and further provides that under no circumstances shall the husband be required to surrender the policies in order to satisfy the wife's claim?

2. Does a state court judgment awarding the wife of a serviceman a community interest in the serviceman's retirement pay frustrate a congressional intent that retirement pay be the separate property of the retiree, immune from claims of the spouse under state community property law?

STATUTE INVOLVED

The statute involved is § 459 of the Social Service Amendments of 1974, Pub. L. No. 93-647 (Jan. 4, 1975). Section 459 is set forth at page 7 of this brief.

STATEMENT

The parties married in 1944 immediately following petitioner's graduation from the United States Naval Academy and lived together as husband and wife during the entirety of petitioner's active service in the military. While in the Navy, the husband obtained two insurance policies, a National Service Life In-

surance policy and a Navy Mutual Aid Association policy, which at the time of trial had a total cash value of approximately $4,500. During his active service in the Navy, petitioner earned retirement pay, which became payable to him in monthly installments upon his retirement in 1965, at which time both parties were domiciliaries of California. The parties separated in 1968 and on May 2, 1972, the trial court entered judgment in a dissolution proceeding, finding that the life insurance policies and the military pay were the separate property of the husband under California community property law. The California Supreme Court entered an opinion filed December 12, 1974, reversing the judgment of the trial court as to both the insurance and the retirement pay. In holding that petitioner's retirement pay was subject to partial distribution to respondent as community property, the court relied on and incorporated its earlier opinion of *In re Marriage of Fithian*, 517 P.2d 449 (Cal. S. Ct.), *cert. denied*, 95 S. Ct. 41 (Oct. 15, 1974).

ARGUMENT

I.

THE OPINION OF THE COURT BELOW DID NOT INTERFERE WITH CONGRESS' INTENT THAT A SERVICEMAN HOLDING A NATIONAL SERVICE LIFE INSURANCE POLICY HAVE THE RIGHT TO CHANGE THE BENEFICIARY UNDER SUCH POLICY.

In *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398 (1950), an enlisted man, without the knowledge or

consent of his wife, named his mother the principal beneficiary under his National Service Life Insurance (NSLI) policy. After the serviceman's death the Veterans Administration commenced to pay his mother the proceeds of the policy in monthly installments, but his widow filed an action in Superior Court contending that under the community property law of California, the marital domicile, she was entitled to one half the proceeds of the policy on the theory that the insurance premiums had been paid from the husband's army pay, which was community property under California law. The Superior Court held that the proceeds of the insurance policy were community property of the widow and the decedent and required the mother, the named beneficiary, to pay the widow one half the amount of insurance payments already received, plus one half of all future payments. The District Court of Appeals affirmed and the Supreme Court of California denied a hearing.

The United States Supreme Court reversed, holding that California community property law as applied in that case conflicted with § 802(g) of the National Service Life Insurance Act of 1940, 38 U.S.C. § 802[1], which provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries . . . ." The Court stated that the result would be the same whether the state court judgment was directed at the money

[1] This provision is now codified in 38 U.S.C. § 717(a).

which the beneficiary received from the government or an equivalent amount.

In *Wissner* the state court judgment clearly interfered with the rights which the insured intended to confer upon his designated beneficiary. The instant case is distinguishable, because the judgment of the court below did not in any way impair the petitioner's statutory right to designate and to change beneficiaries. Nor did the judgment directly or indirectly affect the interest of present or future beneficiaries under the policies.

Petitioner's statement on page 8 of the petition that he must "now surrender his NSLI policy for its cash value in order to have sufficient funds on which to live" misreads the opinion of the court below. While the court did hold that respondent's community interest in the policies entitled her to an award of one half of their cash value, payable out of the husband's share of community assets other than the policies, it went on to make these critical qualifying statements:

> Provision could be made for husband to discharge this obligation over a period of time if insufficient property exists at the time of dissolution. In no event, however, should husband be ordered to surrender, or otherwise impair, his policies in order to satisfy wife's community claim, for such an order would violate the overriding federal law discussed above.

The clear import of this language is that in the event of a conflict between the wife's community claim and

a serviceman's right to designate and to change beneficiaries as reflected in his beneficiary's right to receive the full proceeds of the policies, the latter right prevails. Thus, if in a particular case an NSLI policy is the sole community asset and the husband does not have enough other property to satisfy the wife's community interest in the policy, the opinion below provides that the husband could be required to make installment payments until the wife received the full extent of her claim. Moreover, were the husband to die or become incapacitated before discharging his obligation, the opinion makes clear that his former wife could not reach the proceeds of the policy or their equivalent as against the beneficiary.

In *Wissner* the judgment of the state court required the beneficiary to pay to the serviceman's widow one half of the proceeds of the policy, thereby limiting the insured's absolute statutory right to designate a beneficiary; in contrast, in holding that a state court cannot (1) award an NSLI policy to the other spouse, (2) deprive the insured of his right to change the beneficiary, or (3) require the insured to surrender the policy in order to distribute to the wife her community share of the cash value of the policy, the court below clearly recognized, and stopped short of impinging upon, the paramount federal right of the beneficiary designated by the insured.

II.

AN EXAMINATION OF THE RELEVANT FEDERAL STATUTES AND THEIR HISTORY DISCLOSES NO

CONGRESSIONAL INTENT TO PROTECT A SERVICEMAN'S RETIREMENT PAY FROM HIS FORMER WIFE'S COMMUNITY INTEREST THEREIN AND, IN FACT, REVEALS A CONTRARY INTENT.

A. Pub. L. No. 93-647 Specifically Authorizes the Attachment of Military Pay for the Purpose of Enforcing a Serviceman's Legal Obligations to Make Child Support and Alimony Payments.

Section 459 of the Social Service Amendments of 1974, Pub. L. No. 93-647 (Jan. 4, 1975) provides:

> Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

Part D of the Act, of which § 459 is a provision, is entitled Child Support and Establishment of Paternity. The legislative history of Part D, which is contained in S. Rep. No. 1356, 93d Cong., 2d Sess. (1974), reveals an acute congressional concern over the burgeoning number of parents who are abandoning their families and dishonoring support obligations. Part D of the Act represents Congress' determination that a

stronger federal role is necessary in order to solve this problem. Section 459 is specifically designed to eliminate pre-existing statutory barriers to collection of pay from military personnel and federal employees. 1974 U.S. Code Cong. & Admin. News, No. 15, at 9207.

Section 459 is directly applicable to the present case, because it shows a clear congressional intent not to immunize federal military pay from valid legal claims of dependents of military personnel. That military retirement pay is included in the term *moneys* as used in § 459, is made clear by the discussion in S. Rep. No. 1356 of a provision similar to § 459 in a prior House Report:

> In 1971, the Administration, commenting on a proposal to permit the attachment of retirement pay of military personnel in connection with court orders for child support or alimony, opposed the proposal as extraneous to the bill being considered but noted:
>
> > "If there is sufficient reason to attach retired pay, the same reason undoubtedly exists for an attachment provision applicable to other Federal pays and annuities. Accordingly, the broader subject of attachment of all Federal pays and annuities for support of dependents may well deserve congressional attention as a matter in its own right. (House Report 92-481, p.24.)"

1974 U.S. Code Cong. & Admin. News, No. 15, at 9217.

H.R. Rep. No. 92-481, which accompanied the Armed Forces Survivor's Benefit Plan, Pub. L. No. 92-425 (September 21, 1972), contained very forceful language which explicitly recognized a former spouse's legitimate interest in retirement pay to satisfy a court decree for alimony and the difficulties often involved in enforcing such a decree against a retiree who can avoid his obligations merely by moving to another jurisdiction:

> During the course of its study, the committee received numerous letters from wives or ex-wives of career military personnel saying that after serving along with their husbands during all or a portion of their husbands' military careers, the marriage had terminated and a divorce action or a suit for separate maintenance had been adjudicated and the court had made a decree for alimony or support money to provide for their care and care of their dependent children. Yet despite such an award by a court of competent jurisdiction, the retirees were not honoring such a court decree. Attempts at court actions to force the retirees to pay the amount awarded by the court are frequently thwarted by a retiree pulling up stakes in the state in which he is being sued and moving to another where legal action must commence again.

H.R. Rep. No. 481, 92d Cong., 1st Sess. 17 (1971). The House Committee stated further: " . . . [W]e believe it is wrong for the United States to protect retired and retiree pay while the military retiree can, for practical purposes, ignore court orders." *Id.* at 18.

In recognition of the right of dependents to court ordered support and alimony and the retiree's obligation to comply with such orders, the committee recommended enactment of a provision which would have authorized the attachment of an amount up to one half of a serviceman's retired pay.

While the attachment provision supported by H.R. Rep. No. 92-481 was ultimately deleted from Pub. L. No. 92-425, the report is nevertheless highly relevant to the instant case in view of its discussion of attachment of military pay in the specific context of retirement pay. That S. Rep. No. 1356, accompanying Pub. L. No. 93-647, incorporated part of H.R. Rep. No. 481's discussion of the attachment of military retired pay definitely indicates a congressional intent to make such pay attachable under § 459. H.R. Rep. No. 92-481 is additionally significant because of its very clear recognition of a wife's right to enforcement of an alimony decree and a retiree husband's obligation to comply with the decree.

Section 459 of the Act, read in conjunction with S. Rep. No. 93-1356 and H.R. Rep. No. 92-481, makes clear that a serviceman's alimony and child support obligations may be satisfied out of his retirement pay. It would seem equally clear that a wife's community interest in retirement pay in a community property state comes within the meaning of *alimony* as used in § 459. It cannot seriously be argued that Congress, in enacting such an expansive provision as § 459, intended to draw a fine distinction between alimony

and community property. While many community property states, including California, also provide for alimony under certain circumstances, the statutorily required division of community assets in many cases obviates the need for alimony awards so that the disposition of community property is the practical equivalent of alimony.

Although it is true that the history of 10 U.S.C. § 6323, the statute which authorizes the husband's retirement pay in the present case, and the predecessors of that statute disclose no congressional intention with regard to the availability of military retirement pay for partial distribution to a spouse in a community property state, § 459 has definitively resolved any uncertainties.

B. The California Supreme Court in In Re Marriage of Fithian, 517 P.2d 449 (1974), Correctly Held that Other Federal Statutes Pertaining to Military Benefits are Inapplicable to the Question of Congressional Intent as to Availability of Military Retirement Pay for Partial Distribution to a Retiree's Spouse as Community Property.

As previously contended, § 459 of Pub. L. No. 93-647 should be held dispositive of this question, but even without § 459, the other statutes which petitioner asserts to be indicative of a congressional intent to treat military retired pay as separate property are clearly irrelevant when examined in context and in light of the legislative history.

Petitioner argues that Congress could not have intended the result reached in the present case in view of the Armed Forces Survivor's Benefit Program, 10 U.S.C. §§ 1447 - 1455, Pub. L. No. 92-425 (Sept. 21, 1972). Under 10 U.S.C. § 1450(b) the annuity of a widow automatically terminates upon her remarriage, whereas under the judgment of the state court in the instant case the former spouse continues to receive her community share of the husband's retirement benefits notwithstanding her remarriage. Petitioner contends that to award a spouse of a serviceman an interest in the latter's retirement pay is inconsistent with congressional intent as manifested in the Armed Forces Survivor's Benefit Program, which specifically provided for widows of retired servicemen but made no mention of ex-wives.

This argument completely ignores the history of the legislation. Indeed, the bill which ultimately became Pub. L. No. 92-425 originally contained a provision, very similar to § 459 of Pub. L. No. 93-647, which specifically authorized the attachment of military retirement pay to comply with a court order in conjunction with divorce or separation proceedings. S. Rep. No. 1089, 92d Cong., 2d Sess. (1972). This provision was eventually stricken from the bill, but only because (1) attachment of retirement pay was considered extraneous to the issue of survivor benefit legislation and (2) it was considered inappropriate to provide for the attachment of the pay of military personnel but no other federal employees. The follow-

ing language from the Senate Report reveals that Congress was not ignoring former spouses but was merely deferring the question for another day:

> The committee is in sympathy with the requirement for investigation of the need for such a provision. The committee felt, however, because of the sensitivity and the administrative complexities of this type of provision, it should be considered in terms of its applicability to all Federal pay and personnel. Since attachment is extraneous to the question of survivor benefit legislation, it is improbable that an attachment provision could be evaluated to the extent appropriate or necessary, and therefore it should be considered separately and on its own merits along with legislation that might require all Federal pays to be subject to attachment.

1972 U.S. Code Cong. & Admin. News, p.3300. This excerpt from S. Rep. No. 92-1089 proved to be an accurate foreshadowing of the enactment of § 459.

Petitioner relies on the legislative history of the Retired Serviceman's Family Protection Plan, Pub. L. No. 90-485 (Aug. 13, 1968), 10 U.S.C. § 1431 et seq., in asserting that Congress intended military retirement pay to be the "personal entitlement" of the retiree. A reading of the legislative materials reveals, however, that the phrase "personal entitlement" was used not to declare military retirement pay the separate property of the retired serviceman but to signify that retirement pay ceases with the death of the serviceman, thus underscoring the need for an

annuity plan to provide for a deceased serviceman's family. This statute was specifically designed to liberalize various provisions of the Retired Serviceman's Family Protection Plan in order to encourage greater participation in the plan. 1968 U.S. Code Cong. & Admin. News, p.3294, 3300; S. Rep. No. 1480, 90th Cong., 2d Sess. (1968). The court in *Fithian* made the persuasive observation that "[i]t is not incongruous for Congress to supply a program to aid widows, who no longer have husbands to provide sustenance, and omit to do so for ex-wives who can rely on state family law concepts of support, alimony, and community property for a source of income." 517 P.2d at 454.

Moreover, that Congress provided for automatic termination of an annuity upon divorce, 10 U.S.C. § 1431(c), does not support petitioner's argument that Congress intended to isolate military retirement pay from valid claims of divorced spouses. Since an annuity under the program becomes available only upon death of the serviceman, Congress likely was attempting to prevent a windfall to a former spouse who presumably had already received an equitable share of the community property upon dissolution of the marriage.

10 U.S.C. § 2771 authorizes a serviceman to designate a beneficiary to receive any arrearages in pay which are due but unpaid at his death. The statute affects distribution of only that retirement pay, if any, which was due the serviceman but which he

failed to collect before his death; it cannot reasonably be read to express a congressional intent to preclude the states from classifying retirement pay as community property. The *Fithian* court distinguished the insurance program in *Wissner*, "in which the right to choose a beneficiary was an integral and explicit part of the federal plan," from § 2771, which constitutes "no more than a contingency procedure to distribute whatever money, if any, is due to the serviceman but which he failed to collect." 517 P.2d at 455. It cannot persuasively be argued that Congress intended the designation right under § 2771 to be central to the whole military retirement system and to foreclose the states from characterizing retirement pay as community property. In any event, § 459 clearly makes the right to designate under § 2771 subordinate to a wife's right to enforce an alimony decree against retirement pay and limits the operation of § 2771 to retirement pay, if any, which remains after child support, alimony, and community property decrees have been satisfied.

C. Examined in Context, Decisions of the Court of Claims Holding Retirement Pay to be Compensation for a Retiree's Availability for Recall to Active Service are Inapplicable to a State's Characterization of Military Retirement Pay as Community Property.

Petitioner argues that because § 3105 of Title 38, U.S.C. enables disabled servicemen to waive all or part of their retirement pay and receive instead Vet-

erans Administration pensions, which have been labeled gratuities by federal courts, *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840 (1934), retirement pay, convertible to a gratuity, cannot be community property under California community property law. First of all, federal courts have uniformly classified retirement pay as earned money rather than a gratuity. *Berkey v. United States*, 361 F.2d 983 (Ct. Cl. 1966); *Gordon v. United States*, 140 F. Supp. 263 (Ct. Cl. 1956); *Lemly v. United States*, 75 F. Supp. 248 (Ct. Cl. 1948). Thus retirement pay is clearly an earned entitlement at least until the point of actual conversion. Further, under California law, pensions as well as retirement pay are community property. *In Re Marriage of Fithian*, 517 P.2d at 455. To give effect to the state's treatment of pensions as community property does not conflict with the characterization of pensions as gratuities by federal courts, because the factual contexts in which the federal cases were decided make those cases inapplicable to the present case. In *Lynch* the Court was discussing pensions as gratuities in the context of the question whether pensions, so long as they are not vested, are subject to redistribution or withdrawal by Congress at any time. In *Lemly* the Court of Claims distinguished pensions from retirement pay on the narrow question whether the court had jurisdiction over the claim presented.

Petitioner argues alternatively that even if retirement pay is an earned, not gratuitous, benefit, it is

compensation for the retiree's continuing availability for possible recall to service rather than payment for service already rendered so that any amounts paid the husband following the divorce are his separate property. As stated above, in *Lemly* the Court of Claims distinguished pensions from retirement pay in the limited context of the Court of Claims' jurisdiction. That court has jurisdiction over claims for retirement pay, but not claims for pensions; in *Lemly* the court found that retirement pay is a continuation of active pay on a reduced basis intended to compensate the retired serviceman for his availability to recall to active duty and that therefore the court had jurisdiction of the claim. The distinction between military retirement pay and pensions drawn by the Court of Claims in *Lemly* occurred in a narrow jurisdictional context and cannot logically be deemed controlling in the far different context of classification of retirement pay under state community property law. Petitioner also cites *Hostinsky v. United States*, 292 F.2d 508 (Ct. Cl. 1961), in support of the contention that retirement pay compensates the retiree's availability for future service rather than performance of past duties. *Hostinsky* involved the limited question of the applicability of 5 U.S.C. § 62, which prohibits any person who holds a federal office with an annual compensation greater than $2,500 from simultaneously holding another office, to a retired naval officer who while on retired status served as a fire and damage control superintendent with the

Maritime Administration of the Department of Commerce. The Court of Claims decided only that for the purposes of this statute the retired officer was still a member of the Navy with certain limited duties. The court did not address the question whether retirement pay compensates the serviceman for past or present services. Moreover, in *Gordon v. United States*, 140 F. Supp. 263 (Ct. Cl. 1956), the Court of Claims described retirement pay as an award to servicemen "for the reason that it is something they earned while in the service of their country . . . ." 140 F. Supp. at 264; *see Berkey v. United States*, 361 F.2d 983, 987 n.9 (Ct. Cl. 1966).

Despite any language in prior decisions of the Court of Claims indicating that retirement pay is compensation for present rather than past services, § 459 of Pub. L. No. 93-647 shows clear congressional intent that retirement pay is subject to attachment on behalf of an ex-wife to enforce an alimony decree; thus, regardless of the characterization of military retirement pay, Congress has expressly declared that such pay is available for enforcement of support and alimony decrees.

D. The Decision of Wissner v. Wissner, 338 U.S. 665, 70 S.Ct. 398 (1950), Is Inapplicable to the Question Whether Congress Intended Military Retirement Pay to be Treated as Separate Property of the Retiree.

Wissner involved construction of a specific statute in the light of Congress' purpose in enacting it. Yet

petitioner derives from *Wissner* a five part test which, it is contended, determines whether Congress intended a particular federally conferred property right to be immune from community property classification by the states. The "*Wissner* test" is set out at page 10 of the petition. The first and fifth criteria, that the benefits be intended to directly enhance the morale of servicemen and afford maximum material protection, are drawn from the Supreme Court's discussion in *Wissner* of an argument advanced against the constitutionality of the National Service Life Insurance Act. The Court discussed the other three criteria only as particular characteristics of the National Service Life Insurance program. The test was not articulated by the Court but rather was artificially constructed by the petitioner by paraphrasing a series of statements by the Court taken out of context and grouped together.

In any event, any general relevance *Wissner* might have to the question of the susceptibility of military retirement pay to community property classification is clearly superseded by § 459 of Pub. L. No. 93-647, which makes military pay subject to the enforcement of alimony and support decrees.

CONCLUSION

For the reasons stated above, Respondent says that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter J. Boyd, the attorney for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 28 day of April, 1975, I served three copies of this brief on petitioner by mailing the same in a duly addressed envelope, with airmail postage prepaid, to the attorneys for petitioner, Gary R. Ricks, Esq. and J. Terry Schwartz, Esq., 200 East Carrillo Street, P.O. Box B-B, Santa Barbara, California 93102.

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